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No. 02-1045

In the Supreme Court of the United States

DANIEL ANDERSEN AND LORENZO J. LAMANTIA, INDIVIDUALLY AND ON BEHALF OF THE MEMBERS OF THE INSTITUTE OF GLOBAL PROSPERITY, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that, under this Court's decision in *DiBella* v. *United States*, 369 U.S. 121 (1962), it lacked jurisdiction to review the district court's denial of petitioners' motion seeking the return of property seized pursuant to search warrants, when petitioners' motion sought additional relief in the form of an injunction prohibiting the government from conducting further searches and seizures and from using the information it had obtained pursuant to the warrants.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 298 F.3d 804. The opinion of the district court (Pet. App. 19a-25a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 2002. A petition for rehearing was denied on October 10, 2002 (Pet. App. 26a-27a). The petition for a writ of certiorari was filed on January 7, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners Andersen and LaMantia are the leaders of the Institute of Global Prosperity (IGP), an organization that distributes "educational, political, religious and philosophical materials in the form of books and CDs, much of which is critical of the United States' financial and taxing policies." Pet. App. 2a. Petitioners and other leaders of IGP have been under investigation for tax-related crimes. *Id.* at 2a-3a. Between February 28 and September 25, 2001, the government executed several search warrants in connection with the investigation, including warrants for searches of petitioners' residences. *Id.* at 3a. The warrants authorized agents to search for various items relating to IGP, including "applications for membership, membership cards, membership agreements, * * * [and] lists of names or addresses or telephone numbers (or other identifying data) of members[] [and] prospective members." *Ibid.*

2. On September 28, 2001, petitioners filed an action in the United States District Court for the Central District of California against the government, certain named and unnamed agents of the Internal Revenue Service (IRS), and an alleged informant. Pet. App. 3a. The suit was purportedly brought both on behalf of petitioners themselves and on behalf of the members of IGP. *Id.* at 2a. The complaint alleged (1) a conspiracy to violate petitioners' First and Fourth Amendment rights and the First Amendment rights of members of IGP, and (2) "willful, wanton and malicious violations" of petitioners' Fourth Amendment rights. *Id.* at 3a. Petitioners also filed a motion for a temporary restraining order and preliminary injunction, in which they asked the district court to prohibit any future searches

and seizures and the use of any information obtained from past searches. *Id.* at 3a-4a. In the same motion, petitioners sought a permanent injunction directing the return of all property that had been seized. *Id.* at 4a.

On October 1, 2001, the district court denied petitioners' motion for a temporary restraining order (Pet. App. 20a), and on October 22, 2001, it denied their motion for a preliminary injunction (*id.* at 19a-25a). In denying the latter motion, the court applied the principle that "[o]nly the most extraordinary circumstances warrant anticipatory judicial involvement in criminal investigations." *Id.* at 23a (quoting *Reporters Comm. for Freedom of Press* v. *American Tel. & Tel. Co.*, 593 F.2d 1030, 1065 (D.C. Cir. 1978), cert. denied, 440 U.S. 949 (1979)). Petitioners could not satisfy that standard, the court held, both because their "vague allegations" of constitutional violations did not establish how a criminal investigation of their tax-related activities burdened their First Amendment rights and because any infringement on their rights was outweighed by the government's compelling interest in investigating possible violations of the criminal law. *Id.* at 24a.

3. On July 30, 2002, a divided panel of the court of appeals dismissed for lack of jurisdiction petitioners' appeal of the district court's decision denying their motion for a preliminary injunction. Pet. App. 1a-18a.

a. Observing, as an initial matter, that "[t]he substance of the motion, not its form, controls its disposition," the court of appeals construed petitioners' motion for a preliminary injunction as one for return of property pursuant to Rule 41 of the Federal Rules of Criminal Procedure. Pet. App. 4a-5a.[1] The court then

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[1] The relevant subsection of the version of Rule 41 in effect at the time of petitioners' motion and the court of appeals' decision

applied the rule set forth by this Court in *DiBella* v. *United States*, 369 U.S. 121 (1962): that courts of appeals have jurisdiction to review decisions on Rule 41 motions "only if the motion is solely for return of property and is in no way tied to a criminal prosecution *in esse* against the movant." Pet. App. 5a (quoting 369 U.S. at 131-132). The court of appeals found that petitioners failed both parts of the *DiBella* test and therefore could not establish "the exception to the general rule that motions like theirs are unappealable." *Id.* at 6a. Petitioners, the court explained, had asked not only for return of the seized property but for "significant additional relief"—namely, an injunction prohibiting the IRS from conducting any future searches and seizures and from using the material that had already been seized. *Id.* at 6a-7a. Relying on its decision in *DeMassa* v. *Nunez*, 747 F.2d 1283 (9th Cir. 1984), the court also concluded that the ongoing grand jury investigation constituted a criminal prosecution *in esse*, and that the district court's decision was unappealable for that reason as well. Pet App. 7a-8a.[2]

In holding that petitioners failed both parts of the *DiBella* test, the court declined their invitation to

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was subsection (e), which provided, in part, that a person "aggrieved by an unlawful search and seizure" may file a motion for the return of the property seized. Fed. R. Crim. P. 41(e) (1993). The provision of Rule 41 that governs motions for return of property is now found in subsection (g). Any differences between the two versions are "stylistic only." Fed. R. Crim. P. 41 advisory committee's note (2002 amendments).

[2] For purposes of its decision, the court of appeals assumed, as the parties agreed it should, that there was a grand jury investigation in progress, although the government made no factual representations on the issue. Pet. App. 2a n.1. The record in this case contains material filed *in camera* and under seal.

create an exception to the rule of non-appealability for cases in which the Rule 41 movant alleges a violation of his First Amendment rights. Pet. App. 8a-11a. The court also declined to exercise jurisdiction over the claims that petitioners purported to bring on behalf of other members of IGP. *Id.* at 7a n.4.

b. Judge Reinhardt dissented. In his view, the rule of *DiBella* does not apply to First Amendment claims, and the district court's decision was therefore appealable. Pet. App. 11a-18a.[3]

ARGUMENT

The decision of the court of appeals is correct. Although the court's resolution of one issue conflicts with decisions of other courts of appeals, that issue had no effect on the outcome of the case. Further review is therefore not warranted.

1. Petitioners contend (Pet. 7-11) that the Court should grant certiorari to resolve a conflict in the circuits relating to the second part of the test established in *DiBella*: whether a grand jury investigation constitutes "a criminal prosecution *in esse*" (369 U.S. at 132). While there is a conflict on that issue, see, *e.g.*, Pet. App. 16a n.1 (Reinhardt, J., dissenting) (collecting cases), this is not an appropriate case to resolve it. Under *DiBella*, denial of a motion under Rule 41 is not appealable unless the movant shows *both* that the motion is not tied to "a criminal prosecution *in esse*" *and* that the motion is "solely for return of property."

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[3] On February 25, 2002, the district court dismissed petitioners' claims against all but three defendants, and on September 5, 2002, it granted summary judgment for the remaining defendants. Those rulings are the subject of a separate appeal in the Ninth Circuit, which has not yet been decided. *Anderson* v. *United States*, No. 02-56504.

369 U.S. at 131-132. The court of appeals held that petitioners' motion was not solely for return of property, because they sought "significant additional relief" in the form of an injunction prohibiting future searches and the use of material already seized. Pet. App. 6a. That holding is plainly correct, and indeed has not been challenged by petitioners. They accordingly fail the test of *DiBella* regardless of whether a grand jury investigation is a "criminal prosecution *in esse*." 369 U.S. at 132.

Review is thus not warranted because resolution of the issue that petitioners raise would not alter the ultimate disposition of the controversy. This Court sits "to correct wrong judgments, not to revise opinions." *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945).

2. Petitioners also contend (Pet. 12-15) that the rule of *DiBella* should not apply in a case, like this one, in which the government is alleged to have violated First Amendment rights. In rejecting that claim, the court of appeals relied on the fact that the rule of non-appealability is motivated by a concern that an appeal of the denial of a Rule 41 motion would likely "affect the integrity of the investigation and potential criminal trial." Pet. App. 9a. As the court explained, that concern is "equally valid whatever the specific nature of the constitutional right that the potential criminal defendant seeks to vindicate." *Ibid.* The holding of the court of appeals is correct, and petitioners cite no case in which any court has held otherwise.

3. Neither of petitioners' other arguments provides a basis for granting certiorari.

a. Petitioners argue (Pet. 16-17) that their motion for a preliminary injunction did not seek the return of property; that it therefore should not have been treated as a motion under Rule 41; and that the rule of *DiBella*

accordingly has no applicability to their case. This assertion is not only fact-bound but meritless, for petitioners' motion specifically requested "a permanent injunction * * * ordering all defendants to return all * * * items and information" obtained during the searches and seizures challenged by petitioners. Mot. for Prelim. Inj. & T.R.O. 8.

b. Petitioners also argue (Pet. 17-19) that the court of appeals erred in refusing to exercise jurisdiction over the claims that petitioners purported to assert on behalf of other members of IGP. Petitioners point out that, while they may be the subject of criminal proceedings, the other members of IGP are not.

The court's decision on this issue, however, does not conflict with the decision of any other court. Petitioners' challenge to the decision is in any event meritless, because, even if other members of IGP have no connection to any "criminal prosecution *in esse*," the relief they seek is not "solely for return of property." *DiBella*, 369 U.S. at 131-132. See *DeMassa* v. *Nunez*, 770 F.2d 1505, 1508 (9th Cir. 1985) (Tang, J., concurring).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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